000007

The KING'S GARDEN, INC., Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents

No. 73-1896.

United States Court of Appeals, District of Columbia Circuit.

Argued Jan. 11, 1974.

Decided May 6, 1974.

Cert Denied.

Radio station licensee, which was a nonprofit religious organization, filed petition for review of order of the Federal Communications Commission determining that licensee was discriminating on religious grounda in its employment practices. The Court of Appeals, J. Skelly Wright, Circuit Judge, held that exemption of all activities of any religious corporation, association, educational institution or society from Civil Rights Act ban on religious discrimination in employment was irrelevant to Federal Communications Commission's regulation of broadcast licensees under the Communications Act, and that Commission's rules which exempted employment connected with espousal of a licensee's religious views from Commission's antibias regulations but which required enforcement of antibias regulations with respect to job positions having no substantial connection with program content or positions connected with programs having no religious dimension did not violate licensee's rights under the First Amendment or the Communications Act.

Affirmed.

Bazelon, Chief Judge, concurred specially and filed opinion.

1. **Constitutional Law** ⇐84

Laws must have a secular purpose and a primary effect which neither advances nor inhibits religion. U.S.C.A. Const. Amend. 1.

2. **Constitutional Law** ⇐84

First Amendment demands "neutrality" of treatment between religious and nonreligious groups. U.S.C.A.Const. Amend. 1.

3. **Constitutional Law** ⇐84

Free exercise clause precludes governmental interference with ecclesiastical hierarchies, church administration and appointment of clergy. U.S.C.A. Const. Amend. 1.

4. **Constitutional Law** ⇐84, 90.1(1)

Guarantees of free exercise of religion, free speech and free press combine to provide a religious group the right to choose on sectarian grounds those who will advocate, defend or explain the group's beliefs or way of life, either to its own members or to the world at large. Civil Rights Act of 1964, §§ 701 et seq., 702, 703, as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-1, 2000e-2; Communications Act of 1934, §§ 1 et seq., 303, 307, 309(a), 47 U.S.C.A. §§ 151 et seq., 303, 307, 309(a); U.S.C.A.Const. Amend. 1.

5. **Civil Rights** ⇐2
Constitutional Law ⇐84, 211

Civil Rights Act provision exempting all activities of any religious corporation, association, educational institution or society from ban on religious discrimination in employment shelters myriad activities which have not the slightest claim to protection under constitutional guarantees of free exercise of religion, free speech and free press and the provision appears to be violative of the establishment clause and to deny equal protection. Civil Rights Act of 1964, §§ 701 et seq., 702, 703, as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-1, 2000e-2; U.S.C.A.Const. Amends. 1, 5.

6. **Constitutional Law** ⇐48(1)

Statutes should be construed so as to avoid rather than aggravate constitutional difficulties.

7. **Civil Rights** ⇐13.7
Telecommunications ⇐384

Exemption in Civil Rights Act of all activities of any religious corporation,

association, educational institution or society from ban against religious discrimination in employment immunizes religious organizations only from ban contained in the Civil Rights Act and does not abrogate antibias rules promulgated by the Federal Communications Commission under the Communications Act with respect to religious organizations which own broadcast licenses. Civil Rights Act of 1964, §§ 701 et seq., 702, 703, as amended, 42 U.S.C.A. §§ 2000e et seq., 2000-1, 2000-2; Communications Act of 1934, §§ 1 et seq., 303, 307, 309(a), 47 U.S.C.A. §§ 151 et seq., 303, 307, 309(a).

8. Telecommunications ⇐438

Religious sect has no constitutional right to convert a licensed communications franchise to a church, and a religious group which buys and operates a licensed radio or television station takes its franchise burdened by enforceable public obligations. Communications Act of 1934, §§ 1 et seq., 303, 307, 309(a), 47 U.S.C.A. §§ 151 et seq., 303, 307, 309(a); U.S.C.A.Const. Amend. 1.

9. Constitutional Law ⇐84

Rules of Federal Communications Commission exempting employment connected with the espousal of a sectarian broadcast licensee's religious views from the Commission's regulations precluding employment discrimination on the basis of religion but requiring enforcement of the antibias regulations with respect to job positions having no substantial connection with program content or positions connected with programs having no religious dimension did not violate right to freedom of religious expression of broadcast licensee, which was a nonprofit religious organization. Communications Act of 1934, §§ 1 et seq., 303, 307, 309(a), 47 U.S.C.A. § 151 et seq., 303, 307, 309(a); U.S.C.A.Const. Amend. 1.

Morton L. Berfield, Washington, D. C., with whom Lewis I. Cohen, Washington, D. C., was on the brief, for petitioner.

John E. Ingle, Counsel, F. C. C., with whom John W. Pettit, Gen. Counsel, and Joseph A. Marino, Associate Gen. Counsel, F. C. C., were on the brief, for respondent.

Melvin L. Wulf, New York City, and Joseph Remcho, San Francisco, Cal., filed a brief on behalf of American Civil Liberties Union et al. as amici curiae.

Before BAZELON, Chief Judge, WRIGHT, Circuit Judge, and WYZANSKI,* Senior District Judge.

J. SKELLY WRIGHT, Circuit Judge:

Petitioner is a non-profit, interdenominational, religious, and charitable organization. Its activities include a number of ministries whose basic goal is to "share Christ world wide" (Record at p. 15). Petitioner is also the licensee of Radio Stations KBIQ-FM and KGDN in Edmonds, Washington. In these proceedings it seeks review of an order of the Federal Communications Commission which found that it was discriminating on religious grounds in its employment practices and directed it to submit to the Commission a statement of its future hiring practices and policies.[1] Petitioner relies upon a 1972

* Of the United States District Court for the District of Massachusetts, sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

1. This controversy arose when a job applicant at one of King's Garden's stations complained to the FCC that he was asked questions such as "Are you a Christian?", "Is your spouse a Christian?", and the like. The Commission forwarded the complaint to King's Garden on Aug. 2, 1971 (Record at p. 2). King's Garden responded by claiming the statutory and constitutional right to discriminate on religious grounds with respect to all positions of employment at its radio stations (Record at p. 15). The Commission ruled on May 3, 1972 that only "those persons hired to espouse a particular religious philosophy over the air should be exempt from the non-discrimination rules." In Re Complaint by Anderson, 34 FCC2d 937, 938 (1972). This position was reaffirmed after enactment of the 1972 exemption to the Civil Rights Act mentioned in text. *See* In the Matter of King's Garden, Inc., 38

amendment to Title VII of the 1964 Civil Rights Act which exempts all activities of any "religious corporation, association, educational institution, or society" from the Act's ban on religious discrimination in employment.[2] (Hereinafter the 1972 exemption.) Before 1972 only the "religious activities" of such organizations had been exempted.[3] Petitioner would require the Federal Communications Commission to engraft the 1972 exemption on to the Commission's own rules against sectarian employment practices, promulgated under the "public interest" standard of the Communications Act.[4] The Commission already exempts employment "connected with the espousal of the licensee's religious views."[5] Petitioner contends that a sectarian licensee, like itself, must be allowed to discriminate on religious grounds in all of its employment practices.

We affirm the Commission rulings. The 1972 exemption is of very doubtful constitutionality, and Congress has given absolutely no indication that it wished to impose the exemption upon the FCC. Under these circumstances the Commission is fully justified in finding that the exemption does not control its "public interest" mandate under

FCC2d 339 (1972). The question in this case is whether the Commission's qualified exemption facially conforms to relevant statutes and the Constitution. We do not deal with application of the exemption to any particular job position at King's Garden. It should be noted that King's Garden has requested institution of rule-making proceedings on the Commission's exemption policy. This issue is not before us.

2. The exemption is in § 3 of the Equal Employment Opportunities Act of 1972, Pub.L. 92-261, 86 Stat. 103, 42 U.S.C. § 2000e-1 (Supp. II 1972), amending § 702 of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, former 42 U.S.C. § 2000e-1. The 1972 exemption reads, in pertinent part:

> This subchapter shall not apply * * * to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

The general ban on religious discrimination in employment is at 42 U.S.C. § 2000e-2 (1970).

3. Section 702 of the 1964 Civil Rights Act read, in pertinent part:

> This subchapter shall not apply * * * to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities * * *.

4. The regulations bar employment discrimination by broadcast licensees "because of race, color, religion, national origin or sex." 47 C.F.R. §§ 73.125(a), 73.301(a), 73.599(a), 73.680(a), 73.793(a) (Oct. 1, 1973). The Communications Act of 1934, 48 Stat. 1064 *et seq.*, 47 U.S.C. § 151 *et seq.* (1970), mandates the Commission to regulate broadcast licensees "as public convenience, interest, or necessity requires." *E.g.*, 47 U.S.C. §§ 303, 307, 309(a). The Commission traces its authority to promulgate fair employment rules to the "public interest" standard of its enabling act and to the related fact that broadcasters are "public trustees" with special obligations. *See* Non-Discrimination in Employment Practices: Notice of Proposed Rule Making, 13 FCC2d 766, 769-770 (1968), and Non-Discrimination in Employment Practices, 18 FCC2d 240, 241 (1969). The Communications Act does not itself expressly grant the FCC authority to regulate the employment practices of licensees, but the Commission has noted that employment practices have an obvious, if indirect, impact on programming—over which the FCC does have express authority. *See* Non-Discrimination in Employment Practices: Notice of Proposed Rule Making, *supra*, 13 FCC2d at 770. King's Garden does not deny that the Commission has independent statutory authority to regulate the employment practices of licensees, and contends only that this authority cannot be exercised contrary to the Constitution or to the "national policy" established by the religious exemption in § 3 of the Equal Employment Opportunities Act of 1972. Brief for petitioner at 18. The Commission has stated that any change in its anti-bias rules should be accomplished through formal rule-making and should be adopted only "upon a public interest finding under the Communications Act" (Record at p. 83).

5. *See* In Re Complaint by Anderson, *supra* note 1, 34 FCC2d at 938, and In Re Request of National Religious Broadcasters, Inc., 43 FCC2d 451 (1973).

the Communications Act. The limited exemption which the FCC currently recognizes to its own anti-bias rules adequately protects a sectarian licensee's rights under the Communications Act and the First Amendment. Accordingly we uphold the Commission's regulatory scheme as facially sound, while recognizing that its future application will require continuing judicial scrutiny.

I

The sponsors of the 1972 exemption were chiefly concerned to preserve the statutory power of sectarian schools and colleges to discriminate on religious grounds in the hiring of all of their employees.[6] But the exemption's simple and unqualified terms obviously accomplish far more than this. In covering all of the "activities" of any "religious corporation, association, educational institution, or society," the exemption immunizes virtually every endeavor undertaken by a religious organization. If a religious sect should own and operate a trucking firm, a chain of motels, a race track, a telephone company, a railroad, a fried chicken franchise, or a professional football team, the enterprise could limit employment to members of the sect without infringing the Civil Rights Act.[7]

6. Section 702 of the 1964 Civil Rights Act (Pub.L. 88-352, 78 Stat. 255, former 42 U.S.C. § 2000e-1) had exempted "educational institution[s]" from all of the Act's employment discrimination rules. Early versions of the legislation which became the Equal Employment Opportunities Act of 1972 deleted this blanket exemption for educational institutions and proposed to add "religious educational institution[s]" to the list of religious organizations which § 702 had exempted as to religious discrimination in "religious activities." *See* § 3 of S. 2515, 92nd Cong., 1st Sess., Sept. 14, 1971. Senator Allen objected that

> [u]nder the provisions of the bill, there would be nothing to prevent an atheist being forced upon a religious school to teach some subject other than theology.

Legislative History of the Equal Opportunity Act of 1972 344 (Nov. 1972). To remedy this evil the Senators proposed striking the word "religious" from the term "religious activities" used in the provision exempting religious organizations from the ban on sectarian hiring practices. Amendment 809 to S. 2515, Legislative History, *supra*, at 789. The Senate adopted the Ervin-Allen amendment, *id.* at 1667, and the House also accepted it after a Joint Conference on the 1972 Act, *id.* at 1813-1814. This amendment broadened the exemption as to religious educational institutions—but also, of course, as to *all other* religious organizations listed in the exemption. In giving concrete examples of the workings of their amendment, however, both Senator Allen and Senator Ervin invariably adverted to its effect on religious educational institutions. *Id.* at 846, 848-852. The effect on other religious organizations went undiscussed, except for two very general comments by Senator Ervin:

> Our amendment would strike out the word "religious" and remove religious institutions in all respects from the subjugation to the EEOC.

Id. at 848.

> In other words, this amendment is to take the political hands of Caesar off of the institutions of God, where they have no place to be.

Id. at 1645.

7. *See* note 9 *infra*. It might be argued, in an attempt to read the exemption narrowly, that a commercial enterprise established by a religious sect is not an "activity" of the sect. This does not, however, seem a very fruitful line of argument. If a sect owns and operates an enterprise, on what ground could it be held to be other than an "activity" of the sect? Use of some technical ground—such as separate incorporation of the commercial enterprise—would not narrow the exemption in practice, for religious groups would simply avoid the technicality, *e.g.*, avoid separate incorporation, in setting up their commercial enterprises. To effect a substantive narrowing of the exemption the courts would have to attempt to divide a sect's various undertakings into "secular" and "religious" categories, but it is precisely this categorization which Congress repudiated in 1972.

While it is not uncommon for courts to come very close to rewriting statutes so as to save their constitutionality, the 1972 exemption is a poor candidate for such a salvage operation. The scope of a religious exemption is an issue raising very delicate questions of public policy. While it is reasonably clear that the 1972 exemption violates the Establishment Clause, it is far less clear exactly how much, or in what way, the exemption should be narrowed to avoid First Amendment objections. There may well be a considerable range of permissible alternatives. As a matter of institutional compe-

If owned and operated by a nonreligious organization, the enterprise could not use sectarian criteria in hiring, except where the particular job position carried a "bona fide occupational qualification" of a religious character.[8]

[1] In creating this gross distinction between the rules facing religious and non-religious entrepreneurs, Congress placed itself on collision course with the Establishment Clause. Laws in this country must have a secular purpose and a "primary effect" which neither advances nor inhibits religion. Committee for Public Education & Reli
ty v. Nyquist, 413 U.S. 756, 77
2955, 37 L.Ed.2d 948 (1973); Len
Kurtzman, 403 U.S. 602, 612, 91 S.Ct.
2105, 29 L.Ed.2d 745 (1971); Walz v.
Tax Commission, 397 U.S. 664, 669, 90
S.Ct. 1409, 25 L.Ed.2d 697 (1970).

> [I]t is now firmly established that a law may be one "respecting an establishment of religion" even though its consequence is not to promote a "state religion," * * * and even though it does not aid one religion more than another but merely benefits all religions alike. * * *

Nyquist, supra, 413 U.S. at 771.

> A given law might not *establish* a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment * * *.

Lemon v. Kurtzman, *supra*, 403 U.S. at 612 (emphasis in original). We cannot conceive what secular purpose is served by the unbounded exemption enacted in 1972. As for "primary effect," the exemption invites religious groups, and them alone, to impress a test of faith on job categories, and indeed whole enterprises, having nothing to do with the exercise of religion.

It is true that most of the Establishment Clause cases recently before the Supreme Court have involved state subsidies or tax preferences for religious groups. But in drafting the Clause the Founders were taking equally keen aim at all non-financial "sponsorship" of religious organizations by government. Lemon v. Kurtzman, *supra*, 403 U.S. at 612; Walz v. Tax Commission, *supra*, 397 U.S. at 668. And sponsorship is what this exemption accomplishes. It is
re formula for concentrating and
extending the worldly influence of
e religious sects having the wealth
d inclination to buy up pieces of the
ecular economy.[9]

[2] It was not, of course, constitutionally required that Congress prohibit religious discrimination in private sector employment. But this having been done, by the Civil Rights Act, the wholesale exemption for religious organizations alone can only be seen as a special preference. *Compare* Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967). The First Amendment demands "neutrality" of treatment between religious and non-religious groups. *Nyquist, supra*, 413 U.S. at 792–793. As Mr. Justice Harlan once noted:

> Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerry manders. * * *

Walz v. Tax Commission, *supra*, 397 U. S. at 696 (concurring opinion).

tence and constitutional authority, it is for the Congress, not the courts, to choose among these. *See*, in this regard, 26 U.S.C. §§ 501(c)(3), 502, 511, & 512 (1970), where Congress has shown considerable ingenuity in constructing a very complicated exemption from the income tax laws for certain religious corporations.

8. 42 U.S.C. § 2000e–2(e)(1). The "qualification" must be "reasonably necessary to the normal operation of that particular business or enterprise."

9. The wealth and inclination exist, apparently, in many American religious groups. *See* A. Balk, The Religion Business 8–11 (1968); D. Robertson, Should Churches Be Taxed? 139–170 (1968); M. Larson & C. Lowell, Praise the Lord for Tax Exemption 193–246 (1969).

Because the two religion guarantees often seem to tug in opposite directions, "neutrality" is a notoriously difficult concept.

> A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. * * * The Court must not ignore the danger that an exemption from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise. * * *

Wisconsin v. Yoder, 406 U.S. 205, 220–221, 92 S.Ct. 1526, 1536, 32 L.Ed.2d 15 (1972). *See also* Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). In this matter of exemptions the First Amendment strings a "tight rope" between the two religion guarantees, Walz v. Tax Commission, *supra*, 397 U.S. at 672, and we must see to it that Congress does not slip off.

[3, 4] From 1964 to 1972 Congress had, in our view, a firm purchase on the tightrope. The exemption then granted by the Civil Rights Act to the *religious* activities of religious organizations was itself required by the First Amendment. The Free Exercise Clause precludes governmental interference with ecclesiastical hierarchies, church administration, and appointment of clergy. *See* Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 80 S.Ct. 1037, 4 L.Ed.2d 1140 (1960); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952); McClure v. Salvation Army, 5 Cir., 460 F.2d 553 (1972). In addition, the guarantees of Free Exercise, Free Speech, and Free Press no doubt combine to provide a religious group the right to choose on sectarian grounds those who will advocate, defend, or explain the group's beliefs or way of life, either to its own members or to the world at large. *See* Tucker v. Texas, 326 U.S. 517, 66 S.Ct. 274, 90 L.Ed. 274 (1946); Follett v. McCormick, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943); Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869 (1943); Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); Founding Church of Scientology v. United States, 133 U.S. App.D.C. 229, 409 F.2d 1146, cert. denied, 396 U.S. 963, 90 S.Ct. 434, 24 L.Ed.2d 427 (1969); Anti-Defamation League of B'nai B'rith v. FCC, 131 U.S. App.D.C. 146, 403 F.2d 169 (1968), cert. denied, 394 U.S. 930, 89 S.Ct. 1190, 22 L.Ed.2d 459 (1969). *Compare* Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); Mitchell v. Pilgrim Holiness Church Corp., 7 Cir., 210 F.2d 879, cert. denied, 347 U.S. 1013, 74 S.Ct. 867, 98 L.Ed. 1136 (1954).

[5] But the 1972 exemption now shelters myriad "activities" which have not the slighest claim to protection under the Free Exercise, Free Speech, or Free Press guarantees. It is arguable that Congress may, without violating the Establishment Clause, expand a religious exemption *somewhat* beyond the minimal boundaries created by the several First Amendment liberties. *See* Walz v. Tax Commission, *supra* (property tax exemption for buildings and land used "exclusively for religious, educational or charitable purposes" and "not operating for profit"); Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952) ("released time" exemption from school attendance requirement for students wishing to take religious instruction). *See also* Sherbert v. Verner, *supra*, 374 U.S. at 422–423 (dissenting opinion of Mr. Justice Harlan). But these isolated decisions create no precedent for the unlimited 1972 exemption. In *Zorach*, *supra*, the Court carefully confined its ruling to the facts of the case. In *Walz*, *supra*, the Court stressed the peculiar historical role of property tax exemp-

tions for places of worship, 397 U.S. at 676–678, noted that the tax exemption extended to the non-profit activities of many secular organizations so that the statutory classification was not strictly a "religious" one, *id.* at 673, and carefully refrained from stating or implying that the state could exempt church-owned property used for non-religious, commercial purposes. (The Court has yet to address this last question. *See* Diffenderfer v. Central Baptist Church, 404 U.S. 412, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972); *cf.* Gibbons v. District of Columbia, 116 U.S. 404, 408, 6 S.Ct. 427, 29 L.Ed. 680 (1886).)

By contrast, no historical tradition supports the 1972 exemption, *see Nyquist, supra*, 413 U.S. at 791–792. That exemption obviously creates a classification of a strictly religious character, *id.* And the exemption's benefits clearly extend to the non-religious, commercial enterprises of sectarian organizations.[10] It is conceivable that there are "many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all-embracing secularism." Sherbert v. Verner, *supra*, 374 U.S. at 422 (dissenting opinion of Mr. Justice Harlan). But it hardly follows that the state may favor religious groups when they themselves *choose* to be submerged, for profit or power, in the "all-embracing secularism" of the corporate economy.

In addition to being vulnerable on First Amendment grounds, the 1972 exemption appears unconstitutional on Fifth Amendment grounds as well. To the extent that the non-religious commercial enterprises of religious organizations directly compete with those of non-religious organizations, the 1972 exemption forces the Government to discriminate between business rivals in applying the Civil Rights Act's constraints upon sectarian hiring. The criterion of discrimination—*i.e.* the religious or nonreligious character of the owning or operating group—not only lacks a rational connection with any permissible legislative purpose, but is also inherently suspect. Such invidious discrimination violates the equal protection of the laws guaranteed by the Due Process Clause. *Compare* Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1947).

II

[6] The FCC's own rules against sectarian hiring, promulgated under the Communications Act, exempt employment "connected with the espousal of the licensee's religious views."[11] Petitioner finds in this formula insufficient compliance with the "national policy" established by the 1972 exemption to the Civil Rights Act. But it is very dangerous indeed to inflate a constitutionally doubtful statute into a "national policy" having force beyond the statute's literal command. The customary, and more prudent, course is to construe statutes so as to avoid, rather than aggravate, constitutional difficulties. *See* United States v. Thirty-Seven Photographs, 402 U.S. 363, 369, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971). This course is open to us in the present case. Neither the express terms nor the legislative history of the 1972 exemption indicate that Congress intended the FCC to carve a like exemption into its own anti-bias rules. A definitive resolution of the constitutional issues raised by the 1972 exemption can

10. In Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), the Court also noted that a tax exemption for property used for religious purposes had the virtue of minimising "entanglement" between churches and state authorities, *id.* at 674. But this rationale was obviously not intended to sanction *every* exemption from general laws granted to the "activities" of a religious organization. If it were, no "religious" exemption would ever raise an Establishment Clause issue; the Court has never adopted such a simpleminded rule. *See* Wisconsin v. Yoder, 406 U.S. 205, 220–221, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), *and* Lemon v. Kurtzman, 403 U.S. 602, 614, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

11. *See* note 5 *supra*.

therefore be deferred to a case where they are squarely raised.

[7] While the key term in the 1972 exemption—"activities"—is concededly broad enough to cover broadcasting franchises operated by religious organizations, this means only that these sectarian franchises are immune from the ban on religiously discriminatory hiring contained in the Civil Rights Act. It does not necessarily follow that Congress intended to abrogate the FCC's own anti-bias rules. Not only have these rules always been promulgated under the Communications Act, rather than the Civil Rights Act, but the rules have also, from their inception, gone beyond the commands contained in the Civil Rights Act. For instance, the FCC demands that its licensees take strong affirmative steps to hire members of minority groups[12]; and the FCC's rules apply to every broadcaster —even those too small to fall within the coverage of the civil rights statutes.[13] The Commission's extensive rules, and limited religious exemption, were in full force when Congress debated the 1972 exemption from the Civil Rights Act, but the legislative history makes absolutely no mention of them, of the FCC, or of the Communications Act. In this context we adhere to the

> venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. * * *

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371 (1969) (footnote omitted). This principle has particular application to the FCC, for the Commission's mandate "to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly but expansive,'" *id.* at 380. *See also* FCC v. RCA Communications, Inc., 346 U.S. 86, 90, 73 S.Ct. 998, 97 L.Ed. 1470 (1953); National Broadcasting Co. v. United States, 319 U.S. 190, 218–219, 63 S.Ct. 997, 87 L.Ed. 1344 (1943); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137–138, 60 S.Ct. 437, 84 L.Ed. 656 (1940).

An agency should, of course, always examine new legislation to determine its relevance, if any, to the agency's mandate. *See* McLean Trucking Co. v. United States, 321 U.S. 67, 80, 64 S.Ct. 370, 88 L.Ed. 544 (1944). *Cf.* City of Pittsburgh v. FPC, 99 U.S.App.D.C. 113, 237 F.2d 741 (1956); Mansfield Journal Co. v. FCC, 86 U.S.App.D.C. 102, 107, 180 F.2d 28, 33 (1950). But, having done this, the Commission was justified in finding the 1972 exemption irrelevant to its regulation of broadcast licensees under the Communications Act.

Congress' obvious purpose in enacting the 1972 exemption was to constrain the power of the Equal Employment Opportunities Commission (EEOC) to regulate *private* religious entities. At the time the exemption was debated the civil rights statute to which it is expressly addressed applied only to private sector employers.[14] The exemption's sponsors were chiefly interested in the employ-

12. On affirmative action, *see* 47 C.F.R. §§ 73.125(b), 73.301(b), 73.599(b), 73.680(b), & 73.793(b). These rules are patterned on those used by the Civil Service Commission in hiring federal employees. *See* Non-Discrimination in Employment Practices, *supra* note 4, 18 FCC2d at 243. Even stronger affirmative measures apparently may be required by the Commission in particular instances. *Id.* at 244.

13. The fair employment standards in the civil rights statutes apply only to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

14. The statute now covers "governments, governmental agencies, [and] political subdivisions," 42 U.S.C. § 2000e (Supp. II 1972), as well as private employers, but these public bodies were added by § 2(1) of the Equal Employment Opportunities Act of 1972, the same legislation which added the Allen-Ervin exemption for all of the "activities" of "religious" organizations. The legislative history of that exemption nowhere indicates that Congress gave any consideration to the possibility that a "religious" organization might also be a public or *quasi*-public body. The literal terms of the exemption do cover sectarian radio and television stations, but this

ment rights of wholly private educational institutions.[15] Even in their most sweeping statements the sponsors spoke of immunizing only those activities which had traditionally been free of all government regulation:

> Our amendment would strike out the word "religious" and remove religious institutions in all respects from subjugation to the EEOC.
>
> * * * * * *
>
> In other words, this amendment is to take the political hands of Caesar off of the institutions of God, where they have no place to be.[16]

As Congress is fully aware, broadcasting under the Communications Act is not an altogether private industry. Federally licensed broadcasters are "public trustees." Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 117, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973). For decades Congress has authorized and encouraged the FCC to regulate the broadcast industry in ways which the First Amendment would clearly foreclose in the case of wholly private organs of communication. *Red Lion*, *supra*, 395 U.S. at 386–401. Unlike a religious newspaper, a sectarian radio or television station must, as King's Garden readily concedes, adhere to the "fairness" and "personal attack" doctrines and produce some programs of general community interest. We have no evidence that Congress wished in 1972 to upset this well established doctrine that licensed broadcasters must meet FCC-imposed obligations inapplicable to the private sector generally. King's Garden wishes us to assume that Congress now regards sectarian broadcasters as regulable "public trustees" so far as programming is concerned but as "institutions of God" untouchable by "the hands of Caesar" so far as employment practices are concerned. We would require a sentence or two of pertinent legislative history before crediting Congress with so bizarre a notion.

III

The question remains whether the FCC's anti-bias rules violate King's Garden's rights under the First Amendment and the Communications Act. It is to protect these rights that the Commission exempts from the ban on sectarian hiring "the employment of persons whose work is * * * connected with the espousal of the licensee's religious views." This general policy is to be particularized on a case-by-case basis:

> [As t]here are [job] categories * * * which may be defined differently by each licensee, we do not believe that it is advisable to issue a general declaratory ruling * * *. We have only general information and we are dealing with an area where First Amendment rights are often involved. We believe it would be preferable, therefore, to have specific factual settings presented to us before issuing rulings. * * *[17]

The challenge here is to the facial adequacy of the exemption. Application of the general exemption policy to a particular job position may raise additional problems, but they are not presently before us.

King's Garden argues that the FCC's exemption is so narrow as to abridge the sect's right of religious association, under the Free Exercise Clause, and its right, under the First Amendment generally, to broadcast religious views of its choice.

[8] The premise of the first argument is that King's Garden's radio station is an integral part of the sect's "missionary" structure. From this premise King's Garden concludes that

is an undeliberated consequence of broad draftsmanship. It can hardly be invoked to show that Congress wished the FCC to desist from all regulation of the sectarian hiring practices of sectarian licensees.

15. *See* note 6 *supra*.

16. *Id.*

17. In Re Request of National Religious Broadcasters, Inc., *supra* note 5, 43 FCC2d at 452.

the Commission's fair employment rules tamper unconstitutionally with the sect's hierarchy, membership policy, and administration. The conclusion is based on the recognized doctrine, noted earlier, that the internal affairs of a church are immune from public regulation under the Free Exercise Clause. But the argument's premise is defective. A religious sect has no constitutional right to convert a licensed communications franchise into a church. A religious group, like any other, may buy and operate a licensed radio or television station. *See* Noe v. FCC, 104 U.S.App.D.C. 221, 260 F.2d 739 (1958), cert. denied, 359 U.S. 924, 79 S.Ct. 607, 3 L.Ed.2d 627 (1959). But, like any other group, a religious sect takes its franchise "burdened by enforceable public obligations." *Office of Communication of United Church of Christ* v. FCC, 123 U.S.App.D.C. 328, 337, 359 F.2d 994, 1003 (1966).

[9] King's Garden relies heavily on Wisconsin v. Yoder, *supra*, which recognized that a public obligation of a seemingly neutral and secular character—*i.e.* the duty to send one's children to a secondary school—may violate the religious associational rights of particular individuals by forcing them "to perform acts undeniably at odds with fundamental tenets of their religious beliefs" so that they must "either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region." 406 U.S. at 218. The case is inapposite. Wisconsin's school attendance law intruded upon the traditional way of life of a religious sect by imposing an inescapable duty, backed by criminal penalties, on every parent of secondary school age children. By contrast, King's Garden confronts the FCC's rules only because the sect has sought out the temporary privilege of holding a broadcasting license. *See Red Lion*, *supra*, 395 U.S. at 386–401, *and National Broadcasting Co.*, *supra*, 319 U.S. at 227. The FCC's rules merely condition King's Garden's ability to *extend* its activities by use of "a limited and valuable part of the public domain." *United Church of Christ*, *supra*, 123 U.S.App.D.C. at 337, 359 F.2d at 1003. There are, concededly, constitutional limits on the conditions which the FCC may impose. But the Constitution does not obligate the FCC to relinquish its regulatory mandate so that religious sects may merge their licensed franchises completely into their ecclesiastical structures.

King's Garden's second claim—that the FCC's exemption is too narrow to guarantee the sect's right to broadcast religious views of its choice—proceeds on somewhat firmer ground. While the constitutional dimensions of a broadcaster's speech and press rights have never been clearly delineated, the Supreme Court has recently emphasized that Congress, in enacting the Communications Act, intended licensees to have many of the liberties of private journalistic entities. *Columbia Broadcasting System*, *supra*, 412 U.S. at 109–111 and 124–125. Consequently, it may well be that, after it has met its "fairness doctrine" and "personal attack doctrine" obligations and produced some programs of general community interest, King's Garden has the right to give a sectarian tone or perspective to all of its other programming. This right would be infringed if the Commission, in applying its exemption, were to find no "espousal" of "religious views" in a type of programming which King's Garden considered a significant expression of its sectarian viewpoint.

But this argument is premature. It requires us to speculate that the FCC will apply the terms "espousal" and "religious views" in a cramped and dogmatic fashion. The contrary speculation is equally plausible. In applying its exemption, the Commission may well pay close and sensitive attention to the sincerely held convictions of the sectarian licensees under examination. *See* Wisconsin v. Yoder, *supra*, 406 U.S. at 209–219, *and* Fowler v. Rhode Island, 345 U.S. 67, 69, 73 S.Ct. 526, 97 L.Ed. 828 (1953). To date the Commission has done nothing more than announce that

its exemption will fix upon the nexus between the employment position in question and the religious content of the programs aired by the sectarian licensee. This is precisely the relevant nexus so far as the journalistic rights of the licensee are concerned. Where a job position has no substantial connection with program content, or where the connection is with a program having no religious dimension, enforcement of the Commission's anti-bias rules will not compromise the licensee's freedom of religious expression.

The Commission has set itself the difficult task of drawing lines between the secular and reglious aspects of the broadcasting operations of its sectarian licensees. Though this is a delicate undertaking, it is one which the First Amendment thrusts upon every public body which has dealings with religious organizations. *See Nyquist, supra*, 413 U.S. at 775; Tilton v. Richardson, 403 U.S. 672, 681, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971); Lemon v. Kurtzman, *supra*, 403 U.S. at 614. The courts have traditionally granted the FCC considerable leeway to work out the difficult First Amendment problems endemic to a system of licensed communications. *Columbia Broadcasting System, supra*, 412 U.S. at 102–103 and 132; *Red Lion, supra*, 395 U.S. at 386–401; *National Broadcasting Co., supra*, 319 U.S. at 227. As presently formulated, the Commission's religious exemption is facially adequate. Problems of application there may be, but they will be questions for another day.

Affirmed.

BAZELON, Chief Judge, concurring:

I disagree with my colleagues that the FCC can impose employment requirements in direct conflict with the standards established by Congress in Title VII. The Commission's mandate to act in the "public interest" does not empower it to contravene an explicit Congressional policy.[1] This is so, however, only if the policy in question is constitutional. I am convinced by the reasoning of part I of the court's opinion that Title VII's exemption of all "activities" of any "religious corporation, association, educational institution or society" violates the Establishment Clause of the First Amendment. Therefore, I would hold the exemption unconstitutional, and not binding on the FCC.

UNITED STATES of America
v.
Sylvester KEARNEY, Jr., Appellant.
No. 73-1288.

United States Court of Appeals,
District of Columbia Circuit.
May 17, 1974.

Defendant was convicted in the United States District Court for the District of Columbia, Aubrey E. Robinson, Jr., J., of various offenses, and appealed. The Court of Appeals, MacKinnon, Circuit Judge, held that under a District of Columbia statute defining burglary as entry without breaking with intent to commit any criminal offense, consent to enter is not a defense where one is shown to have entered with the requisite criminal intent.

Convictions for assault with dangerous weapon vacated as lesser included offenses; convictions otherwise affirmed.

1. Criminal Law ⇐994
Indictment and Information ⇐191(9)

Assault with dangerous weapon was lesser included offense in armed robbery offense, and additional convictions for assault with dangerous weapon would

1. *See* Southern Steamship Co. v. Labor Board, 316 U.S. 31, 62 S.Ct. 886, 86 L.Ed. 1246 (1942).

F.C.C. 73-534

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

000018

In Re Request of
NATIONAL RELIGIOUS BROADCASTERS, INC.
For a Declaratory Ruling

MEMORANDUM OPINION AND ORDER

(Adopted May 16, 1973; Released May 21, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON, REID AND WILEY CONCURRING IN THE RESULT.

1. *In King's Garden Inc.*, 34 FCC 2d 937, 24 RR 2d 281 (1972),[1] we stated that a station that is licensed to a religious organization may discriminate[2] on the basis of religion in its employment practices as to those hired to espouse the licensee's religious philosophy over the air. We further stated:

> . . . the Commission does not see any reason for a broad interpretation that would permit discrmination in the employment of persons whose work is not connected with the espousal of the licensee's religious views. (34 FCC 2d at 938, 24 RR 2d at 282)

Now under consideration is a letter seeking a ruling as to the applicability of the *King's Garden* decision to various employee categories, filed February 9, 1973, by National Religious Broadcasters, Incorporated (NRB), on behalf of a number of its members. We shall consider the NRB's letter as a request for a declaratory ruling filed pursuant to Section 1.2 of our Rules.

2. In NRB's view, the exemption from the nondiscrimination rules should be interpreted:

> . . . to include those persons responsible for or connected with the planning, preparation, scheduling, presentation, and responses to queries relating to such programs espousing a particular religious philosophy. Illustratively this would include personnel having responsibility for or a direct connection with such programs as writers and research assistants for these religious programs, executive personnel supervising the programs, and the person or persons at the station charged with the responsibility of answering religious type communications stemming from such programs.
>
> In addition, we are advised that some religiously oriented stations include among the station personnel religious counselors (1) answering inquiries on the air and (2) answering mail or telephone inquiries of a religious nature which are not broadcast.

---

[1] Affirmed on reconsideration, 38 FCC 2d 339, 25 RR 2d 1030 (1972). King's Garden has filed an appeal from our decisions in the United States Court of Appeals for the Ninth Circuit, Case No. 73-1058.

[2] Our general nondiscrimination requirements are set out in Section 73.125, 73.301, 73.599 and 73.680 of our Rules.

3. We have no difficulty with some of the employee categories listed by NRB. Under the *King's Garden* decision, writers and research assistants [3] hired for the preparation of programs espousing the licensee's religious views are exempt from the nondiscrimination rules as being connected with the espousal of those views. Similarly, those hired to answer religious questions on a call-in program would be exempt. On the other hand, announcers, as a general category, would not be exempt from the nondiscrimination rules. There is no reason why an announcer must be of a particular faith in order to introduce a program or insert news, commercial announcements, or station identifications during or adjacent to any program.

4. There are other categories listed by NRB which are not so clear cut. As to those categories, which may be defined differently by each licensee, we do not believe that it is advisable to issue a general declaratory ruling such as that requested by the NRB. We have only general information and we are dealing with an area where First Amendment rights are often involved. We believe it would be preferable, therefore, to have specific factual settings presented to us before issuing rulings. We can say generally that our present rules proscribe religious discrimination in employment practices and that the exemption from those rules set out in the *King's Garden* decision is limited to those who, as to content or on-the-air presentation, are connected with the espousal of the licensee's religious views.

5. We wish to emphasize that our decisions in this area are restricted to the *broadcast activities* of licensees that are religious organizations. We cannot and do not make any ruling as to those activities that are not part of broadcast operations. Religious organizations that are licensees may wish to consider whether certain employees are actually part of the broadcast operation or a part of their religious activities generally.

6. In view of the above, IT IS ORDERED, That the request for a declaratory ruling filed by the National Religious Broadcasters, Incorporated, IS GRANTED to the extent indicated above, and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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[3] We are dealing with the function of the particular person, not his or her title. Thus a secretary does not become exempt from the nondiscrimination rules by changing his or her title to "writer" or "research assistant."

FCC 72-387
75863

KING'S GARDEN, INC.)
Radio Station KGDN)
Seattle, Washington)

May 3, 1972

[¶53:125, ¶53:301] Employment practices.

Hiring policies of a licensee, a Christian religious organization, were discriminatory and not in compliance with Commission rules, insofar as it discriminated on religious grounds in employing persons, such as salesmen, whose work was not connected with the espousal of the licensee's religious views. King's Garden, Inc., 24 RR 2d 281 [1972].

This is in reference to: (a) the letter of July 19, 1971, of Mr. Trygve J. Anderson alleging discriminatory hiring practices by Stations KGDN(AM) and KBIQ-FM, Edmonds, Washington, both of which are licensed to you; and (b) your responses to that letter filed September 20 and October 12, 1971.

In his letter, Mr. Anderson states that in seeking employment at your stations, he was asked: "Are you a Christian? ", "How do you know you are a Christian? ", "Is your spouse a Christian? ", and "Give a testimony. " Mr. Anderson further states that, "Such questions obviously have no bearing on a person's ability to handle a job in broadcasting, and could only be used to discriminate against potential employees because of their religious beliefs. " Mr. Anderson requests, therefore, that your stations be required to delete all requests for religious preferences and beliefs from their employment applications. Mr. Anderson sought a job with you as an announcer or newsman.

Mr. Anderson's letter raises a question as to compliance with §§73.125 and 73.301 of the Commission's Rules, which prohibit licensee employment policies that discriminate on the basis of race, color, religion, national origin or sex. In your response, you indicate that 78 percent of Station KGDN's programming is "inspirational, " and that Station KBIQ-FM's format is primarily "good music, " which serves as a vehicle for the hourly airing of "brief essays stimulating a desire for higher moral and spiritual values. " You state that you are a Christian religious organization with a mission to "share Christ. " Since Stations KGDN and KBIQ-FM are a part of your overall program, you assert that it is necessary to inquire of prospective employees whether they subscribe to your objectives. You deny, however, that your inquiries violate the Commission's rules.

In support of your position, you state that our nondiscrimination rules were based on the Civil Rights Act of 1964. That Act exempts from its provisions religious corporations "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation. . . of its religious activities . . . . " 42 USC §2000e-1. You also quote 42 USC §2000e-2(e), which provides that it is not an unlawful

employment practice to classify an individual "on the basis of his religion, sex, or national origin in those certain circumstances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Finally, you cite the interpretive memorandum submitted to the Senate by Senators Clark and Case, floor managers for the bill, during the debate on the Civil Rights Act. That memorandum states with respect to the "occupational qualification" exception stated in 42 USC §2000e-2(e):

> "This exception is a limited right to discriminate on the basis of religion, sex or national origin where the reason for the discrimination is a bona fide occupational qualification. Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion." (110 Congressional Record 7213)

In essence, you argue that your employees "perform work connected with. . . [your] religious activities" and you are exempt under the provisions of 42 USC §2002-1, and that religious qualifications are a "bona fide occupational qualification" within the meaning of 42 USC §2000e-2(e).

It should be noted, however, that in your role as a licensee of the Commission, you do not exist solely to espouse a particular religious philosophy. You are required to operate in the public interest, as defined by the Commission's rules and policies. You are also required to have a policy of making time available for the presentation of other, including non-Christian, religious views, Young People's Association for the Propagation of the Gospel, 6 FCC 178 (1938). Clearly, therefore, all work performed by employees of Stations KGDN and KBIQ-FM is not connected with the carrying on of their religious activities. Moreover, the Commission does not believe that religion is a qualification that is "reasonably necessary" to all aspects of the stations' normal operations. In keeping with the exemptions you cite from the Civil Rights Act of 1964, the Commission believes that those persons hired to espouse a particular religious philosophy over the air should be exempt from the nondiscrimination rules. But also in keeping with the very limited nature of the exemptions afforded by the 1964 Act, the Commission does not see any reason for a broad interpretation that would permit discrimination in the employment of persons whose work is not connected with the espousal of the licensee's religious views. As to sales personnel, it should be noted that the sale of commercial time to the business community at large does not come within the example given in the Senate interpretive memorandum, quoted above.

In sum, your hiring policy discriminates on the basis of religion as to all station personnel, and is not, therefore, in compliance with §§73.125 and 73.301 of the Commission's rules. To hold otherwise would strike the word "religion" from those rules as to any station licensed to a religious organization.

CLASSIC 99
KFUO·FM

DATE: March 15, 1989

TO: Paul Devantier

FROM: Tom Lauher

RE: EEO COMPLIANCE

The attached "Review of Defensive Measures" is taken from the EEO Handbook, A Practical Guide for Broadcasters.

Out of the 130 measures listed, KFUO-FM has implemented or completed 79. Ten of the measures appear to be "Not Applicable" to our situation. The remaining 41 measures are currently being reviewed to see whether the action has been taken, needs to be taken or is not applicable to our situation.

CC: Dennis Stortz
Ron Klemm
Bob Thomson
Paula Zika ✓
Jim Rice

Enclosure

CHAPTER 10

REVIEW OF DEFENSIVE MEASURES

There is no 100% safe way to avoid equal employment opportunity difficulties, but there are ways of minimizing the odds that problems will occur. You will do much to avoid problems if you understand the concepts outlined throughout this handbook and take the preventive measures suggested.

The following is a quick, capsule guide to those suggestions.

General

- ✓ Take EEOC matters seriously. Too many companies consider equal employment a joke until they get a lawsuit.
- ✓ Evaluate all employment practices, and eliminate those that have an adverse impact on women and/or minorities.
- ■ Establish an EEO officer to implement your station's EEO program and to keep current on developments in the law.
- ✓ Eliminate any job qualification that has an adverse impact on women or minorities and is not job-related.
- NA ■ Validate any test that has an adverse impact on women or minorities.
- ✓ Monitor your wage schedules and classifications to ensure that men and women performing equal work are receiving equal pay, and that women and minorities are not always at the lower end of the scale.
- ✓ Evaluate job descriptions and employment practices to ensure that they do not reflect unlawful stereotypes.
- ✓ Make sure that women and minorities have the same opportunity to obtain favorable assignments as white males.

NA ■ Apply dress and appearance codes evenhandedly to female and male employees.

NA ■ If your station uses a consultant to evaluate on-air talent, be sure to retain a firm which uses well-recognized survey techniques. Review the survey techniques to ensure that no unlawful bias is involved.

✓ Do not take any discriminatory action in an effort to satisfy a perceived audience preference.

✓ Make all employment decisions on the basis of objective, job-related considerations, and be consistent.

■ Maintain personnel files on all employees, including their applications and/or resumes, performance and attendance/tardiness records, evaluations, disciplinary records, etc.

✓ Develop a climate in which comments based on racial or sexual stereotypes are completely inappropriate.

For FCC Purposes

✓ Prepare and adopt a written EEO policy statement and program. (See Chapter Two.)

■ Establish a procedure for reviewing and controlling managerial and supervisory performance under your EEO program.

✓ Inform your employees about your EEO policy and program, and ask for their cooperation and assistance in the station's efforts to recruit, hire, and promote qualified women and minorities.

✓ Review your employment application form and delete any language that may suggest or imply that you consider non-job-related factors in hiring decisions.

✓ Place a notice on your employment form in bold print, informing job applicants that discrimination is prohibited, and that persons who believe they have been discriminated against may notify appropriate governmental agencies.

■ Include a copy of your EEO program in personnel manuals and employee handbooks.

■ Communicate your station's EEO policy and program and your employment needs to sources of qualified applicants without regard to race, color, religion, national origin or sex, and solicit their recruitment assistance on a continuing basis.

■ Maintain a list of the recruitment sources you will use in seeking qualified female and minority applicants.

■ Review your list of recruitment sources on a regular basis to determine whether they have been productive. Add new sources and eliminate non-productive ones.

DEFENSIVE MEASURES

- Maintain written records of all the referrals made by your recruitment sources, and inform recruitment sources, in writing, of the disposition of applicants they have referred.
- ✓ Place employment advertisements in publications with a significant circulation among, or of particular interest to, minorities and women.
- ✓ Include in every help-wanted advertisement a notice that you are an equal opportunity employer, and draft advertisements carefully so that they do not indicate, either explicitly or implicitly, a preference for one sex over another.
- ✓ Consider the establishment of an on-the-job training program to upgrade skills of current employees and to make them eligible for promotion to higher level positions within the station.
- ✓ Maintain statistical data regarding the race, sex, and national origin of referrals, applicants, and employees.
- ✓ Review all of your personnel policies and procedures, including tests, education and experience requirements, and similar employment prerequisites, to discover and eliminate all potentially discriminatory requirements and/or criteria.
- ✓ Conduct a continuing campaign to exclude every form of prejudice or discrimination based upon race, color, religion, national origin, or sex from the station's personnel policies and practices and working conditions.
- Conduct a continuing review of your job structure and employment practices, and adopt positive recruitment, training, job design, and other measures to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility throughout the station.
- Make sure that your EEO Officer is familiar with all the technical aspects of the EEO laws applicable to your station.
- Make sure that department heads and supervisors are familiar with their EEO obligations.
- NA If your station is located in a community with a significant population of persons who do not speak English, post EEO notices both in English and in other significant languages.
- NA If you recruit at schools and colleges with a significant female and/or minority enrollment, utilize at least some female and minority recruiters.
- ✓ Establish systems and procedures for evaluating and monitoring your EEO performance on a regular basis.
- If your employment profile is deficient, determine why and take remedial steps.
- *Document all EEO efforts.* (See Chapter Nine.)

Sexual Harassment

- ✓ Establish and disseminate a policy regarding sexual harassment.
- ✓ Develop appropriate sanctions for employees who engage in any form of sexual harassment.
- ✓ Prepare and distribute a memorandum to supervisors advising them of the station's policy regarding sexual harassment.
- ✓ Designate a person or committee to whom employees can bring their complaints about sexual harassment.
- ✓ Inform employees of their right to complain about sexual harassment, and explain how they can pursue complaints within the station.
- ✓ Investigate promptly and thoroughly any complaint or other evidence of possible sexual harassment.
- ✓ Take prompt and appropriate disciplinary action against any employee who engages in sexual harassment and keep a record of the discipline imposed.
- ✓ Do not allow sexual jokes, teasing, or innuendo to become a routine part of the work environment.

Pregnancy Discrimination

- ✓ Review existing benefit and leave policies to ensure that pregnant employees are not treated differently from other employees.
- ✓ Revise employment and personnel policies to make explicit that employees with pregnancy-related medical conditions will qualify for benefits in the same manner as all other employees.
- ■ Establish a policy regarding voluntary parental leave and apply it consistently to male and female employees.
- ✓ Do not insist that a pregnant employee take leave if she and her doctor agree that she is capable of performing her job.
- ✓ Provide pregnant employees with the same accommodations made for employees with other temporary medical disabilities.

Age Discrimination

- ✓ Include age in your policy against discrimination.
- ✓ Never allow age to be a factor in any employment decision.
- ✓ Record any problems with an aging employee's performance, in order to objectively determine whether he or she is capable of continued employment.
- ✓ Never rely on an older employee's "slowing down" or being "out of touch" with the industry as a basis for discharge or layoff.

Religious Discrimination

- ✓ Disregard the religious beliefs or practices of applicants and employees in making decisions to hire, promote, transfer, assign, discipline, or discharge.
- ✓ Consider methods of accommodating employees' religious beliefs and practices. Explore all possible methods of accommodation before refusing accommodation.
- ✓ Consider carefully before imposing a dress or appearance code that may infringe upon employees' religious beliefs or practices.
- ✓ Frame pre-employment inquiries carefully, so that members of certain religions are not excluded from your applicant pool.
- ✓ Maintain flexibility in the scheduling of interviews and/or application periods, so that members of particular groups will not be excluded from applying.

National Origin Discrimination

- NA ■ If you wish to require proof of citizenship, require it from *all* employees.
- ✓ Do not refuse to hire non-citizens if the impact of that refusal is to exclude individuals of a particular national origin.
- ✓ Do not require fluency in English unless it is reasonably necessary to the job.
- NA ■ If you maintain a rule requiring employees to speak English in the station, draft it carefully. Specify the business reason for the rule, give employees notice of the rule, and inform them of the discipline that will result if they violate the rule.

Handicap Discrimination

- ■ Ascertain whether your station is covered by laws prohibiting discrimination against the handicapped. If so:
- ■ Review and revise employment criteria to ensure that they do not tend to screen out qualified handicapped individuals.
- ■ Eliminate pre-employment inquiries as to handicap status or the nature and extent of a handicap.
- ■ Consider what reasonable accommodations can be made for handicapped employees without imposing an undue hardship on your business.

Hiring

- ✓ Prepare a written job description for each position in the station, specifying all essential job requirements.

- Where appropriate, post notices of vacancies in the station, and afford current employees the opportunity to apply for promotion.
- Contact minority organizations, organizations for women, media, educational institutions, and other potential sources of female and minority applicants, for referrals.
- ✓ Do not use sex- or age-based language in your advertisements, *i.e.* "young woman," "cameraman," or "Girl Friday."
- ✓ Review your employment application forms, making sure they ask for only job-related information.
- ✓ Review education and experience requirements, to make sure that you are not asking more than is necessary for the job.
- ✓ Avoid general aptitude tests.
- NA Do not give a physical exam until after a conditional employment offer has been made. Such an exam, if you choose to give it, must be administered to *all* applicants.
- NA Keep results of medical examinations *confidential*.
- ✓ Review employment criteria to ensure that you are not screening out qualified individuals.
- ✓ Educate interviewers as to permissible and impermissible inquiries and conduct.
- Interview all applicants who appear to be qualified. If you decide that an applicant has insufficient qualifications to be interviewed, document and inform the applicant, in writing, of your reasons.
- Document the objective, job-related reasons for rejecting each applicant that is not hired (with specific references to the job description, where appropriate).
- Document the objective, job-related reasons for selecting the successful applicant (with specific references to the job description, where appropriate).
- Inform each rejected applicant, in writing, why he or she was not selected for the position.
- ✓ Inform referral sources whether the applicant(s) referred were hired or rejected.
- ✓ Retain all applications, notices of interviews, correspondence with applicants and referral sources, notices, and advertisements.
- ✓ Monitor your applicant flow, to ensure that you are attracting sufficient numbers of female and minority applicants.
- ✓ Clearly set forth an employee's salary and other terms and conditions of employment at the outset to avoid future misunderstanding.

- If a written agreement of employment is used, make sure that it spells out management rights.
- Don't make any verbal or written representations that may be later construed as binding contractual commitments. Don't make promises you can't keep.

Job Assignments and Transfers

- Have objective, non-discriminatory reasons for all job assignments and transfers.
- Document your reasons for selecting one employee over another for reassignment or transfer.
- Never make job assignments or transfers on the basis of stereotypes or your perception of the preference of your audience or customers.
- Never consider race, sex, national origin, age, or any other protected characteristic in making job assignments and transfers.

Evaluations

- Establish a formal evaluation procedure, whereby employment evaluations are performed on a regular periodic basis.
- Establish written standards for evaluations. These standards should be clear, objective and job-related.
- Make sure that the evaluation focuses on the significant aspects of job performance, without giving undue weight to minor elements of the job.
- If you use subjective criteria, ensure that they are closely related to the skills necessary for successful on-the-job performance.
- Require that evaluations be in writing and relate to the written standards.
- Inform employees of their evaluations, and allow them to comment in person and in writing on the evaluation form. The employee also should be asked to sign the evaluation form.
- Establish a review process, whereby an employee can discuss his or her evaluation with a third party at the station and can challenge any part he or she believes to be incorrect.
- NA If you utilize outside consultants in evaluating on-air talent, monitor their activities carefully, and assess their suggestions critically. Ensure that no improper inquiries or unlawful bias is involved in their procedures.

Promotions

- Have written standards and guidelines for making promotional decisions. The standards should be clear, objective, and as detailed as possible. All employees should be aware of the standards being utilized.
- Evaluations for promotions should be in writing, and should indicate how

and why the candidate for promotion does or does not meet the written standards. Be specific.

- Both the standards and the evaluation of particular employees should reflect only the important aspects of job performance.
- If subjective factors are utilized in evaluating a candidate for promotion, the subjective factors should be only a part of the promotional decision, and not the full basis for it.
- Ensure that promotional decisions are reviewed by at least two managers or supervisors, to safeguard against any inference of discriminatory bias.

Dress and Appearance Codes

- Make sure your dress and appearance code is related to a clearly-articulated station image.
- Limit the code's applicability to those employees with on-air exposure, or who otherwise may affect the station's image with the public.
- Apply equivalent rules to males and females.
- Make exceptions, where appropriate, to avoid rules having an adverse impact on protected group members.
- Draft your dress and appearance code so as to reasonably accommodate your employees' religious beliefs and practices.

Discipline and Discharge

- Establish written rules of conduct for all employees, and follow the rules faithfully and consistently.
- Put all disciplinary actions in writing, and state your reasons for the action taken. You should ask disciplined employees to acknowledge the disciplinary action with their signature, or send a copy of the form to their home address.
- Establish a system of progressive discipline.
- Avoid suspicious timing.
- Consider a policy allowing employees the option of resigning instead of being fired. This creates fewer hard feelings, the employee is less likely to feel vindictive, and it gives him or her a better chance to find another job, which limits your potential liability for "back pay."
- Establish a policy that it *always* takes more than one person to fire an employee. This eliminates "impulse" discharges and gives another manager or supervisor the opportunity to inquire about what happened.
- Give every discharged employee the *correct* reasons for his or her discharge, in writing.